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No. 01-

011819 JUN 11 2002

IN THE

Supreme Court of the United States

RICK SALGADO, *et al.*,
Petitioners,

v.

MIGUEL ROSALES, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Could reasonable officers disagree, under *Saucier v. Katz*, 533 U.S. 194 (2001), on the legality of using deadly force against an armed suspect—fleeing the scene of a gang-related, drive-by shooting—who never takes aim at the officers but poses a general threat to the community if allowed to escape?

LIST OF PARTIES

Petitioners Rick Salgado and Jose Lopez are police officers employed by the City of Phoenix. Together with their employer, the officers were named as defendants in a civil rights action (the City has since been dismissed and is not a party to this Petition).

Respondent Miguel Rosales is the plaintiff in the action below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	3
CONCLUSION	12
APPENDICES	1a

TABLE OF AUTHORITIES

CASES	Page
Alexander v. City and County of San Francisco, 29 F.3d 1355 n. 13 (9th Cir. 1994)	6
Anderson v. Creighton, 483 U.S. 635 (1987)	8
Brower v. County of Inyo, 884 F.2d 1316 (9th Cir. 1989)	6
Curnow v. Ridgecrest Police Department, 952 F.2d 321 (9th Cir. 1991)	5
Crawford-El v. Britton, 523 U.S. 574 (1998)	8
Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001)	6
Ford v. Childers, 855 F.2d 1271 (7th Cir. 1988)	5
Forrett v. Richardson, 112 F.3d 416 (9th Cir. 1997)	5, 6
Graham v. Connor, 490 U.S. 386 (1989)	5, 6, 8, 9, 10
Hunter v. Bryant, 502 U.S. 224 (1991)	10, 11
Illinois v. Lafayette, 462 U.S. 640 (1983)	6
Krueger v. Fuhr, 991 F.2d 435 (8th Cir. 1993), *cert. denied*, 510 U.S. 946 (1993)	5
Malley v. Briggs, 475 U.S. 335 (1986)	10, 11
Mitchell v. Forsyth, 472 U.S. 511 (1985)	2
Plakas v. Drinski, 19 F.3d 1143 (7th Cir. 1994) *cert. denied*, 115 S.Ct. 81 (1994)	6
Saucier v. Katz, 553 U.S. 194 (2001)	*passim*
Snyder v. Trepagnier, 119 S.Ct. 868 (1999)	7
Tennessee v. Garner, 471 U.S. 1 (1985)	5, 6, 7, 11
United States v. Martinez-Fuerte, 428 U.S. 543 n. 12 (1976)	6
United States v. Robinson, 414 U.S. 218 (1973)	9
Whren v. United States, 517 U.S. 806 (1996)	8

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	2
28 U.S.C. § 1343(3)	2
42 U.S.C. § 1983	2
U.S. Constitution, Fourth Amendment	2

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Salgado and Lopez respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the court of appeals denying rehearing on March 13, 2002 is contained under Appendix A. The memorandum decision of the court of appeals is unreported at Appendix B. The District Court's September 9, 1999 order granting in part and denying in part summary judgment is included in Appendix C.

JURISDICTION

The court of appeals rendered its judgment on December 26, 2001, followed by an order denying a petition for rehearing and suggestion for rehearing *en banc* on March 13, 2002 (Appendix A). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment states in pertinent part as follows:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures shall not be violated. . . .

STATEMENT OF THE CASE

This is a civil rights action arising from the use of deadly force by Officers Salgado and Lopez against Respondent Rosales on June 19, 1993 in Phoenix, Arizona. The 42 U.S.C. § 1983 complaint alleged, *inter alia*, that these two officers violated Rosales' Fourth Amendment right to be free from unreasonable force. The District Court for the District of Arizona had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(3).

Following briefing on a motion for summary judgment filed by the officers, the District Court entered an order granting in part and denying in part the motion. Specifically, the District Court denied that portion of Petitioners' motion seeking qualified immunity on the excessive force claim. Petitioners appealed the denial of qualified immunity to the Ninth Circuit under *Mitchell v. Forsyth*, 472 U.S. 511 (1985), contending that the District had erroneously merged the Fourth Amendment liability standard with the related but distinct qualified immunity analysis and mistakenly concluded that "a jury could certainly find that the officers' use of deadly force was not reasonable." Pet. App. C at 11a.

The Ninth Circuit initially stayed any ruling on the appeal pending the outcome of this Court's anticipated decision in *Saucier v. Katz*, 553 U.S. 194 (2001). Once the stay was lifted following *Katz*, however, the Ninth Circuit issued an abbreviated memorandum decision affirming the denial of qualified immunity. While purporting to apply the two-pronged qualified immunity analysis reaffirmed in *Katz*, the Ninth Circuit initially reasoned that a Fourth Amendment violation occurred when Salgado and Lopez shot Rosales in the back:

> Under the facts as developed at this stage, Officers Salgado and Lopez used unjustifiable force when they shot Rosales in the back. By their own admission, the officers did not consider Rosales a fleeing felon as he approached them. And, for purposes of this appeal, they concede that Rosales never turned and aimed his gun at them once he passed their position. Nor did they offer any evidence that they believed Rosales posed a significant threat or specified threat to others.

Pet. App. B at 3a. In professed allegiance to *Katz*, the Ninth Circuit then undertook a second question which it framed as follows: "whether, in using excessive force, Salgado and Lopez were reasonably mistaken as to the legal constraints on their use of deadly force." The panel immediately answered this question in the negative by referencing its earlier analysis of the Fourth Amendment issue: "Again, the officers' own statements belie any reasonableness in their mistaken belief that shooting Rosales in the back was justified." *Id.* at 4a. The Ninth Circuit denied the subsequent petition for rehearing. Pet. App. A.

REASONS FOR GRANTING THE PETITION

While Petitioners have conceded for purposes of determining the qualified immunity issue that Rosales (the suspect/plaintiff) made no movement or turn toward the

officers while he ran from the drive-by shooting scene,[1] several other factual concessions are critically important and were omitted from the Ninth Circuit's decision:

- While working off-duty as security guards at a restaurant in a dangerous part of east Phoenix, (where drive-by shootings and gang incidents were common), the two officers personally heard and observed 5-6 gunshots, at midnight, from a nearby gun battle seconds earlier;
- The officers saw Rosales and two companions running from the gun scene in the officers' direction;
- Rosales, in apparent pursuit of another, was carrying a gun;
- Rosales conceded hearing the verbal warning: "STOP—PHOENIX POLICE!" before he was shot;
- Rosales conceded that he had no intention of stopping when he heard the police command, due to the fact he was violating his parole by being in possession of the gun;
- Rosales' two unarmed companions immediately dropped to the ground while Rosales continued to run;
- Rosales testified that he was shot by police in the back and side as he continued to run past them, having never pointed his gun at them.

Under the Ninth Circuit's analysis, these facts gave the officers no right to use deadly force and, moreover, no entitlement to qualified immunity from personal liability. While

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[1] The officers testified in their depositions that Rosales turned toward them while running past them, with the gun in his hand and his arm extended. To avoid a summary judgment dispute, however, the officers have accepted as true Rosales' deposition testimony that he never pointed his gun toward the officers during his flight from the gunfight.

disadvantaged in their efforts to scrutinize the Ninth Circuit's decision based on its brevity, Petitioners submit the following bases in support of the Petition:

1. *Katz* applies to *all* Fourth Amendment cases, including those involving deadly force. The doctrine of qualified immunity does not merely protect police who *arrest* or unnecessarily injure seemingly guilty (but perhaps innocent) people who pose a threat to high-level executives; it protects police who *shoot* seemingly dangerous (but perhaps harmless) people who pose a threat to police or the community they serve. This case represents the latest among Ninth Circuit decisions in which this principle has been ignored or avoided, while other circuits appear to have no difficulty relieving police officers of personal liability when they fire their weapons at suspects. *Compare Curnow v Ridgecrest Police Department*, 952 F.2d 321 (9th Cir. 1991) (officers not entitled to immunity because suspect "did not the point the gun at the officers and apparently was not facing them when they shot him") [2]; with *Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988) (officer constitutionally justified in shooting bank robbery suspect in the back based on circumstances confronting officer); and *Krueger v. Fuhr*, 991 F.2d 435 (8th Cir. 1993), *cert. denied*, 510 U.S. 946 (1993) (shooting suspect in the back constitutional where officer in foot pursuit saw suspect reach toward his right hip to pull knife, observing: "it is not remarkable that an escaping felony suspect would be shot in the back.").

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[2] The only published Ninth Circuit decision finding police constitutionally justified in shooting a suspect in the back is *Forrett v. Richardson*, 112 F.3d 416 (9th Cir. 1997). It involved a violent suspect's hour-long flight from a residential burglary in which he had shot two victims. In concluding that police were justified in shooting the unarmed suspect in the back as he ignored officer commands to surrender and began climbing over a fence, the Ninth Circuit stated: "Under [the *Garner*] test, it is not necessary that the suspect be armed or threaten the officer with a weapon." 112 F.3d at 420.

Fourth Amendment analysis of deadly force cases has proven difficult for some Ninth Circuit panels, who continue to mistakenly assume that police must show the exhaustion (or careful consideration) of less intrusive alternatives before resorting to deadly force. *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989) were designed to put this false notion to rest,[3] yet Ninth Circuit cases decided since these include similarly restrictive language reprimanding police when they fail to explore alternatives less intrusive than deadly force. *See generally Deorle v. Rutherford*, 272 F.3d 1272, 1282 (9th Cir. 2001) ("Nothing in the record before us suggests that [the officer] considered other, less dangerous, methods of stopping [the suspect]."); *Forrett*, 112 F.3d at 420 ("The alternative must be reasonably likely to lead to apprehension before the suspect can cause further harm."); *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1366 n.13 (9th Cir. 1994) ("we need not, and do not, express any opinion on the validity of [the] argument" that the deadly force used by the officers was unreasonable because the officers failed to exhaust less intrusive alternatives.") and *Brower v County of Inyo*, 884 F.2d 1316, 1318 (9th Cir. 1989) ("Did a reasonable, non-deadly alternative exist for apprehending the suspect.").[4] This disparate treatment of deadly force cases from all other Fourth Amendment issues (searches and arrests) helps

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[3] *See also Illinois v. Lafayette*, 462 U.S. 640, 647 (1983) (proper Fourth Amendment inquiry is whether officers acted reasonably, not whether they had less intrusive alternatives available to them); and *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n.12 (1976) ("The logic of such elaborate less—restrictive—alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure posers").

[4] Other circuits do not appear to struggle in following this Court's pronouncements on the subject. *See Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 81 (1994) (the Constitution does not require "law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used.")

explain why application of the qualified immunity doctrine to deadly force actions continues to be wildly inconsistent within and without the Ninth Circuit. And if a judge believes that deadly force is unjustified because of less intrusive alternatives available to the officer, how likely is it that such officer will succeed in convincing the same judge to grant him immunity nonetheless based on non-obvious nature of his constitutional mistake?

Garner's deadly force test [5] does not displace the qualified immunity analysis which must occur under *Katz*.[6] The qualified immunity evaluation under *Katz* (no liability if "a reasonable officer . . . could have believed that [the use of force] was within the bounds of appropriate police responses") is no different in a case involving deadly force than it is in a lawsuit seeking damages for overly tight handcuffs. By deciding the *Garner* question adversely to police, a court does not then become bound to also decide the qualified immunity against the officer. Yet this is precisely what the Ninth Circuit panel did below—holding that the "unreasonableness" of the officers' belief that the shooting

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[5] Under *Garner*, an officer's use of deadly force is reasonable if "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." 471 U.S. at 3.

[6] An analogous case involving a similar immunity issue was almost considered by this Court in *Snyder v. Trepagnier*, 525 U.S. 1098 (1999) (certiorari granted), 526 U.S. 1083 (2000) (writ dismissed pursuant to Rule 46). *Snyder* involved an officer's shooting of a felony suspect in the back as he ran from the officer through a muddy swamp, following a high-speed chase. *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998). It is unfortunate that the distinction between qualified immunity and Fourth Amendment liability in excessive force cases was drawn in *Katz* (involving the arrest/detention of a heckler at a speech given by then-vice president Gore) instead of *Snyder* (a deadly force case), for it would have laid to rest the notion that *Garner* cases should be treated differently under qualified immunity.

was constitutionally justified similarly compelled the denial of qualified immunity. Granting the Petition is necessary to settle this issue and resolve the conflict.

2. An officer's subjective beliefs concerning the danger he and others face is largely irrelevant when evaluating his entitlement to qualified immunity. This is a longstanding Fourth Amendment principle—the role of objectivity in assessing an officer's actions—yet the Ninth Circuit chose to poison its analysis by relying exclusively on the officers' subjective assessment of danger in ruling against them.

Whether the question is one involving qualified immunity or Fourth Amendment analysis, this Court has repeatedly emphasized that the governmental actor's subjective motivation or intent is irrelevant. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (qualified immunity depends on "the objective [albeit fact-specific] question whether a reasonable officer would have believed [the relevant conduct] to be lawful."); *Graham*, 490 U.S. at 397 ("the question in police brutality cases is 'whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their intent or motivation"); *Crawford-El v. Britton*, 523 U.S. 574 (1998) ("Evidence concerning the defendant's subjective intent is simply irrelevant to [the qualified immunity] defense."); and *Whren v. United States*, 517 U.S. 806 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

Despite this well known body of precedent, the Ninth Circuit seized upon deposition testimony of the officers which stated that *they* personally did not consider Rosales to be a "fleeing felon" as he raced past them—from the drive-by shooting scene—with gun in hand. This testimony[7] does

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[7] One logical explanation for the officers' unwillingness to classify Rosales as a fleeing felon was the fact that the officers had already

nothing to undermine their entitlement to qualified immunity. If a risk of danger would be apparent to the "reasonable police officer" examining the facts, it is quite irrelevant that the officer involved in the shooting subjectively discounts such risk.[8] *See United States v. Robinson*, 414 U.S. 218, 236 (1973) ("[I]t is of no moment that [the officer] did not indicate any subjective fear of the [arrestee] or that he did not himself suspect that [the arrestee] was armed.").

By relying exclusively on the officers' testimony that they did not consider Rosales to be a fleeing felon the Ninth Circuit disregarded established precedent. An objectively reasonable officer could certainly conclude that Rosales posed a threat without the officers themselves "offer[ing] any evidence that they believed Rosales posed a significant or specified threat to others." Pet. App. B at 3a. Petitioners urge the Court to either grant certiorari on this basis or, alternatively, remand this matter to the Ninth Circuit for reconsideration in light of the objective test required by *Graham* and *Katz*.

3. Judges should not classify constitutional mistakes as reasonable or unreasonable but must ask the question: "*Could*

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testified to their personal reasons for shooting him—he pointed the gun at them during his flight. Everyone acknowledges that Petitioners would be justified in shooting Rosales had he turned toward them with gun in hand, yet Petitioners did not appreciate the impact their answers to hypothetical questions would have (but should not have) on appellate judges applying summary judgment standards to the evidence.

[8] Suppose a foolishly brave officer does not consider himself in danger when surrounded by knife-wielding gang members, testifies accordingly, yet somehow fights his way free. No one can seriously suggest that his foolish assessment of the dangerous circumstances will overcome his entitlement to qualified immunity. The same goes for an officer staring down the barrel of a rifle—if he subjectively thinks the gun unloaded and is simply a scare tactic, his subjective (and naive) belief will not prevent him from escaping liability if he should shoot the suspect for reasons unrelated to the danger he faced.

a reasonable officer believe the stipulated conduct was constitutionally acceptable?" Only by applying the hypothetical judgment of reasonable officers—not their own personal views of what is reasonable—will judges be true to this Court's well established precedent. *See Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (qualified immunity inquiry is whether "a reasonable officer could have believed that probable cause existed to arrest" the suspect, not whether "another reason-able, or more reasonable, interpretation of the events can be constructed five years after the fact."); and *Graham*, 490 U.S. at 396-97 (whether force used is objectively reasonable is judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.").

The subtle distinction between what a reasonable jury *could find* and what a reasonable officer *could believe* escaped both the District Court and Ninth Circuit in this case.[9] Yet the viewpoint from which the qualified immunity question is asked illustrates the difference between a single level of objective reasonableness (the substantive Fourth Amendment standard) and a more forgiving standard that leaves room for mistaken judgments and reasonable disagreements among police officers (the qualified immunity test). *See Hunter*, 502 U.S. at 228; and *Malley v. Briggs*, 475 U.S. 335 (1986). In essence, a judge's analysis of qualified immunity mirrors, with one important difference, the summary judgment standard used in routine negligence cases: While a judge reviewing the evidence on an ordinary Rule 56 motion asks whether a reasonable jury could find in favor of the non-movant—and if so, summary judgment must be

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[9] The District Court below denied qualified immunity based on its view that "a jury could certainly find that the officers' use of deadly force was not reasonable." Pet. App. C at 11a. The Ninth Circuit's decision, while reciting *Katz*, was no less erroneous in stating that: "the officers' own statements belie any reasonableness in their mistaken belief that shooting Rosales in the back was justified." Pet. App. B at 4a.

denied—a judge deciding a qualified immunity motion asks whether a reasonable officer "could believe" the conduct lawful and, if so, the motion must be *granted*. *Malley*, 475 U.S. at 341 ([I]f officers of reasonable competence could disagree on this issue, immunity should be recognized.").

Only by concluding that reasonable officers would universally condemn this police shooting can personal liability be imposed on Petitioners. Yet the Ninth Circuit refused to examine this case from the viewpoint(s) of reasonable officers on the scene and instead substituted its own judgment as to what the exigencies of the moment required or allowed. Had the Ninth Circuit correctly applied Supreme Court precedent from *Katz*, *Hunter*, and *Malley*, it would have been impossible for the panel to reach the conclusion it implicitly reached: that no reasonable officer in the world could believe Petitioners' use of deadly force against the armed, fleeing Rosales was constitutionally lawful. Such a result mocks qualified immunity analysis and is probably even incorrect from a substantive Fourth Amendment view. *See Garner*, 471 U.S. at 21 ("Although *the armed burglar would present a different situation*, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous.") (emphasis added).

Garner does not demand that police shoot only those criminal suspects whose guns are loaded, pointed, and cocked at police; there exist other factual situations, including the apprehension of felony suspects fleeing the scene of a drive-by shooting, which are unsettled enough to an officer that his decision to employ deadly force should not be subjected to civil rights liability simply because his view of Fourth Amendment boundaries turned out to be inaccurate. Certiorari is needed to bring the Ninth Circuit into conformity with established precedent.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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